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No. 15-415

# In the Supreme Court of the United States

ENCINO MOTORCARS, LLC, PETITIONER

v.

HECTOR NAVARRO, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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## QUESTION PRESENTED

Whether "service advisors" at automobile dealerships are exempt under 29 U.S.C. 213(b)(10)(A) from the overtime-pay requirements of the Fair Labor Standards Act.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

### INTEREST OF THE UNITED STATES

This case presents the question whether service advisors at automobile dealerships are exempt under 29 U.S.C. 213(b)(10) from the overtime-pay requirements of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* The United States has a significant interest in the resolution of that question because the Department of Labor (Department) is responsible for administering and enforcing the FLSA's minimum-wage and overtime-pay provisions. 29 U.S.C. 204, 211(a), 216(c), 217.

### STATEMENT

1. Congress enacted the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, to protect workers by establishing federal minimum-wage and overtime guarantees. See *Brooklyn Sav. Bank* v. *O'Neil*, 324

U.S. 697, 706-707 & n.18 (1945); see also 29 U.S.C. 206 (minimum wage), 207 (overtime pay). The FLSA, however, exempts from its overtime requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements" if the salesman, partsman, or mechanic is employed by a retail dealership primarily engaged in selling such vehicles or implements. 29 U.S.C. 213(b)(10)(A). The question presented is whether such "service advisors" fall outside Section 213(b)(10)(A)'s overtime exemption because they are not salesmen primarily engaged in "selling * * * automobiles" (as the government and respondents contend), or whether "service advisors" qualify for exemption as "salesmen" primarily engaged in "servicing automobiles" (as petitioner contends, see Pet. Br. 18, 23).

a. Section 213(b)(10) took its current form in 1974 after evolving as part of a series of amendments to the FLSA. In 1961, Congress enacted an exemption from the Act's minimum-wage and overtime requirements for "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements." Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 73 (enacting 29 U.S.C. 213(a)(19) (1964) (repealed 1966)). After just four years, however, Congress considered legislation to repeal that exemption. See *Minimum Wage-Hour Amendments, 1965: Hearings on H.R. 8259 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. Pt. 1, at 5 (1965) (*1965 House Hearing*) (reproducing H.R. 8259 § 305).

The National Automobile Dealers Association (NADA) opposed repealing the exemption. *1965 House Hearing* 366, 369. In addition, NADA requested that Congress clarify the state of the then-existing law by enacting an overtime exemption for a particular subset of its members' employees, namely, any "automobile salesman or mechanic [employed] by an establishment primarily engaged in the business of selling automobiles or trucks." *Id.* at 369. With respect to salesmen, NADA's representative testified that the "automobile salesmen" who would be exempt were "extremely well-paid employees" who did not need overtime protection, and that it would be "practically impossible" to "keep accurate records of the time [a salesman] spends working" because "[a] salesman * * * is actually selling, or trying to sell, every place he goes where he is in contact with the public" and therefore "spends a substantial number of hours performing his duties away from the dealer's place of business." *Id.* at 368-369; see *id.* at 372.

In 1966, Congress repealed the FLSA's automobile dealership exemption. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 209(a), 80 Stat. 836 (repealing 29 U.S.C. 213(a)(19)). Congress, however, accommodated NADA's request for an overtime exemption by enacting an exemption for:

> (10) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers.

*Id.* § 209(b), 80 Stat. 836 (29 U.S.C. 213(b)(10) (1970)).

In 1970, the Administrator of the Department's Wage and Hour Division (Administrator) issued an Interpretive Bulletin addressing the 1966 amendments. 35 Fed. Reg. 5856 (Apr. 9, 1970). As pertinent here, the Administrator addressed the scope of Section 213(b)(10) by construing the terms "salesman," "partsman," and "mechanic." 29 C.F.R. 779.372(c) (1971). A "salesman," the bulletin explained, "is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicle or farm implements" sold by his employer. 29 C.F.R. 779.372(c)(1) (1971). The bulletin also stated that "[e]mployees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsman, or mechanic as described [in the bulletin] are not exempt under section [2]13(b)(10)." 29 C.F.R. 779.372(c)(4) (1971).

In 1974, following the Department's Interpretive Bulletin, Congress revisited Section 213(b)(10) both (1) to repeal "[t]he overtime exemption for partsmen and mechanics" in establishments "selling aircraft and trailers," and (2) to add an exemption for "salesmen" in establishments "selling boats." H.R. Rep. No. 913, 93d Cong., 2d Sess. 47 (1974); see *id.* at 4, 13.

Rather than reenacting a single provision addressing all exempt "salesmen" at automobile, truck, farm-implement, trailer, boat, or aircraft dealerships, however, Congress enacted two parallel provisions within Section 213(b)(10). See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, 88 Stat. 65. One exempts any "salesman, partsman, or mechanic" primarily engaged in "selling or servicing"

automobiles, trucks, or farm implements. 29 U.S.C. 213(b)(10)(A). The other exempts "any salesman primarily engaged in selling trailers, boats, or aircraft." 29 U.S.C. 213(b)(10)(B). This latter provision omits any reference to "partsmen or mechanics" or to "servicing" such vehicles. The overtime exemption in Section 213(b)(10) thus now exempts:

> (10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or
>
> (B) any salesman primarily engaged in selling trailers, boats, or aircraft, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers.

29 U.S.C. 213(b)(10).

b. Between 1978 and 2011, the Department did not enforce Section 213(b)(10) consistent with its 1970 Interpretive Bulletin concerning service advisors. By 1978, two courts of appeals—one in a precedential opinion and the other in a nonprecedential disposition—disagreed with the Department, holding that Section 213(b)(10) exempts "service advisors" from the FLSA's overtime-pay requirements. *Brennan* v. *Deel Motors, Inc.*, 475 F.2d 1095, 1098 & n.3 (5th Cir. 1973) (explaining that Section 213(b)(10) "is not entirely clear" and that "the issue here is a close one"); *Dunlop* v. *North Bros. Ford, Inc.*, 529 F.2d 524 (6th Cir. 1976) (Tbl.) (unpublished, one-word disposition).

In 1978, the Administrator issued an opinion letter stating that Section 213(b)(10)(A)'s exemption could extend to a "service advisor" because a service advisor is "engaged in selling activities" if his "service sales [are not sales] for warranty work" performed under a warranty previously purchased by the customer. Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter WH-467 (July 28, 1978), available at 1978 WL 51403. The Administrator noted that his position was "a change from the position set forth in section 779.372(c)(4) of our [1970] Interpretive Bulletin." *Ibid.*

In 1987, the Wage and Hour Division revised its Field Operations Handbook (FOH), which provides internal enforcement policy for the Department's FLSA investigations, to address "service advisors" and similarly titled employees. The revision stated that because the "Fifth and Sixth Circuits" and "two district courts" had concluded that service advisors are exempt under Section 213(b)(10), the Wage and Hour Division "will no longer deny the [overtime] exemption for such employees." Wage & Hour Div., U.S. Dep't of Labor, *Field Operations Handbook* § 24L04(k) (Oct. 20, 1987). "This policy," the revision stated, "represents a change from the position in [Interpretive Bulletin] 779.372(c)(4), which will be revised as soon as is practicable." *Ibid.*

In 2004, the Fourth Circuit issued the second precedential decision by a court of appeals holding service advisors exempt under Section 213(b)(10)(A). See *Walton* v. *Greenbrier Ford, Inc.*, 370 F.3d 446 (2004).

c. In 2008, the Department issued a notice of proposed rulemaking proposing, *inter alia*, to revise 29 C.F.R. 779.372 to state that "service advisors" are

exempt under Section 213(b)(10)(A). See 73 Fed. Reg. 43,654, 43,658-43,659, 43,671 (July 28, 2008).

In 2011, following public comment on the proposal, the Department issued a final rule readopting its 1970 understanding of Section 213(b)(10) and repromulgating its regulatory interpretation of "salesman," "partsman," and "mechanic" with minor revisions. 76 Fed. Reg. 18,832, 18,837-18,838, 18,858-18,859 (Apr. 5, 2011). The Department agreed with the conclusion that Section 213(b)(10)(A) "requires an employee to either primarily service the vehicle or 'sell' the vehicle—not sell the service of the vehicle." *Id.* at 18,838. The Department accordingly determined that the provision exempts only "salesmen who sell vehicles and partsmen and mechanics who service vehicles" and "does not" exempt "service managers, service writers, service advisors, or service salesmen" who sell servicing for such vehicles. *Ibid.*

The 2011 regulation provides that, *inter alia*, for purposes of both Section 213(b)(10)(A) and (B), "a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the automobiles, [other vehicles], or farm implements" that the establishment employing him is primarily engaged in selling. 29 C.F.R. 779.372(c)(1). The 2011 regulation omits former Section 779.372(c)(4), which had separately addressed the non-exempt status of "service advisors."

2. Petitioner owns a Mercedes Benz dealership for which respondents currently or previously worked as "Service Advisors." J.A. 39. Petitioner employed service advisors, including respondents, in its "service center" to "meet and greet Mercedez Benz owners as

they enter the service area"; evaluate each owner's "service and/or repair needs"; "solicit and suggest[]"service work for the vehicle; and "write up an estimate for the repairs and services" for the owner, at which point the vehicle is "taken to the mechanics at [the dealership] for repair and maintenance." J.A. 39-40. Service advisors may call the owner while the vehicle is with a mechanic to "solicit and suggest" additional service work. J.A. 40.

Petitioner requires service advisors to work from 7 a.m. to 6 p.m. at least five days a week, during which time the service advisors must "remain at their service posts" and be "on call" during any "meal or rest break[s]." J.A. 39. Petitioner pays service advisors on a pure commission basis, calculated according to the amount of service work they sell. J.A. 40-41.

3. In September 2012, respondents filed this action alleging, as relevant here, that petitioner failed to pay them overtime wages required by the FLSA. J.A. 42-43, 48, 55. The district court dismissed respondents' FLSA claims and declined to exercise jurisdiction over their state-law claims. Pet. App. 22-32. The court concluded that Section 213(b)(10)(A) is ambiguous but declined to accord *Chevron* deference to the Department's 2011 regulations. *Id.* at 25-29. The court held that service advisors are engaged in the "'selling and servicing' of automobiles" like "salesmen and mechanics" and that the Department's contrary conclusion was unreasonable. *Id.* at 29.

4. The court of appeals reversed in relevant part and remanded. Pet. App. 1-19.

First, like the district court, the court of appeals concluded that Section 213(b)(10)(A) is "ambiguous" because it provides "no clear answer to whether Con-

gress intended to include service advisors within the exemption." Pet. App. 6-8. The court explained that it would be "plausible to read the term 'salesman' broadly and to connect the term to 'servicing automobiles,'" but that it is "at least as plausible" to read "salesman" as linked only to "sell[ing]" automobiles, which service advisors do not do. *Id.* at 7. The court stated that Congress may often intend to link "each subject * * * with each verb" when it "uses a list of disjunctive subjects (here, 'salesman, partsman, or mechanic') followed by a list of disjunctive verbs (here, 'selling or servicing')," but that the analysis of that question ultimately "depends on context." *Id.* at 14. "[M]ost English speakers," the court explained, would understand that the statement that I know my pets need to be let out "'if my dogs or cats are barking or meowing'" is intended in context to refer "only to a barking dog and a meowing cat." *Ibid.*

The court of appeals concluded that Section 213(b)(10) is similar. The court explained that "it is hard to imagine, in ordinary speech, a "mechanic primarily engaged in selling automobiles." Pet. App. 14-15. "[I]t seems that Congress intended the subject 'mechanic' to be connected to only one of the two verb clauses, 'servicing.'" *Id.* at 15. The court concluded that the same analysis applies to "salesman," because "[i]t is hard to imagine, in ordinary speech, [a] 'salesman primary engaged in servicing automobiles." *Ibid.* "The nature of the word 'salesman,'" the court reasoned, "strongly implies the actions that the person would take—selling." *Ibid.* In this statutory context therefore, the court concluded, "Congress likely intended the subject 'salesman' to be connected to only one of the two verb clauses, 'sell-

ing.'" *Ibid.* But because "Congress had not 'directly spoken to the precise question'" whether Section 213(b)(10)(A) applies to "service advisors," the court found the statute to be ambiguous. *Id.* at 8 (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842 (1984)).

Second, the court of appeals held that the Department's 2011 notice-and-comment regulation reflects a reasonable determination that service advisors do not qualify for the exemption under Section 213(b)(10)(A). Pet. App. 8-19. The court first concluded that earlier subregulatory statements in the agency's 1978 opinion letter and 1987 FOH did not reduce the degree of deference owed to the 2011 regulation. *Id.* at 8-11. The court explained that the Department's regulations in 29 C.F.R. 779.372(c) had consistently interpreted Section 213(b)(10) for 45 years, and that the Department had carefully considered public comments addressing the question here before adopting its 2011 regulation. Pet. App. 9-10. Even if that regulation might be viewed as a "change in position," the court added, "an agency is permitted to change its position," and the Department both acknowledged the contrary views in the 1978 opinion letter and "rationally explained why, in its view," its final regulation properly construed the scope of the exemption. *Id.* at 10.

The court of appeals ultimately concluded that the Department's regulation reflected a reasonable and "permissible choice" to which deference is warranted. Pet. App. 11-19. The Department's regulation was consistent with a "natural reading" of the statutory text, the court explained, which "strongly suggests that Congress did not intend that both verb clauses

[selling or servicing] would apply to all three subjects" and that Congress instead "likely intended the subject 'salesman' to be connected to only one of the two verb clauses, 'selling.'" *Id.* at 14-15. In addition, the court added, the reading "does not render any term meaningless or superfluous," *id.* at 15, and is consistent with the "inconclusive" legislative history, *id.* at 15-19.

## SUMMARY OF ARGUMENT

The court of appeals correctly accorded *Chevron* deference to the Department of Labor's 2011 interpretation of Section 213(b)(10)(A) in notice-and-comment regulations. Although Section 213(b)(10)(A) is not itself unambiguous on the precise question whether service advisors are exempted from the FLSA's overtime-pay requirements, its text, statutory context, and legislative history all strongly indicate that the provision exempts only salesmen who sell vehicles and partsmen and mechanics who service such vehicles—but not service advisors, on the rationale that they sell the servicing performed by others. The Department's construction of Section 213(b)(10)(A) to that effect is thus reasonable and entitled to deference.

1. A statute like Section 213(b)(10)(A) that uses a series of nouns (here, "salesman, partsman, or mechanic") followed by a series of gerunds ("selling or servicing") can be read in one of two ways. Sometimes, each of the antecedent nouns is intended to link to each gerund. Alternatively, when distributive phrasing is meant, each noun is properly understood to refer to an appropriate gerund. The interpretive canon *reddendo singula singulis* recognizes that drafters sometimes utilize distributive phrasing and that the proper interpretation of such language appropriately turns on the context in which it is used.

The fact that the word "or" is disjunctive will therefore address the relationship between the words in the noun series or in the gerund series, but does not resolve the relationship of the words in one series to those in the other.

Section 213(b)(10)'s statutory context strongly suggests distributive phrasing. First, the term "salesman" logically suggests the appropriate gerund phrase—"selling" vehicles—just as the terms "mechanic" and "partsman" are tied logically to "servicing" vehicles. Second, when Congress used the term "salesman" by itself in Section 213(b)(10)'s second clause, it utilized only the phrase "selling" vehicles. 28 U.S.C. 213(b)(10)(B). And Congress in that clause omitted the gerund "servicing" to effectuate its repeal of an overtime exemption for the employees properly linked to that term (mechanics and partsmen). *Ibid.* That drafting choice strongly suggests that Congress understood and intended Section 213(b)(10)(A) to apply only to salesmen "selling" vehicles and mechanics and partsmen "servicing" such vehicles, not to other employees who could be said to be "selling the servicing" of such vehicles. Indeed, the legislative history of Section 213(b)(10), beginning with NADA's original request for the exemption embodied in the 1966 amendments, indicates that Congress intended to exempt only those salesmen selling automobiles and other vehicles.

Petitioner's contention (Br. 19, 25) that service advisors are exempt because they are salesmen engaged in the "selling of the servicing of automobiles" fits poorly with the text of Section 213(b)(10)(A). Such a sales employee is not "primarily engaged in" either "selling * * * automobiles" or "servicing automo-

biles," as the provision requires, 29 U.S.C. 213(b)(10)(A). In particular, the task of "selling servicing" for vehicles is not naturally understood to constitute "servicing" such vehicles.

2. Although Section 213(b)(10)(A) does not itself put the issue beyond debate, the foregoing considerations show that the Department's implementation of the provision is reasonable and entitled to deference. *Chevron* deference applies where, as here, an agency exercises a general delegation of congressional authority to interpret the statute it administers. This Court has thus previously held that the Department's notice-and-comment rulemaking pursuant to the same statutory authority at issue here is entitled to *Chevron* deference.

Petitioner argues that deference is unwarranted because the Department failed to account for "reliance" on its 1978 opinion letter in a way that threatens "retroactive liability." But Congress expected such regulatory changes and enacted 29 U.S.C. 259(a) to avoid retroactive liability by providing a defense for good-faith reliance on superseded agency guidance like that invoked by petitioner. Moreover, petitioner's claim of far-reaching consequences is significantly overstated. The FLSA provides a separate overtime exemption for salesmen in retail or service establishments who receive more than half their earnings from commissions and earn more than 1.5 times the minimum wage. 29 U.S.C. 207(i). If service advisors at retail or service establishments are compensated as petitioner suggests, such employees would be exempt under that separate provision, but not under Section 213(b)(10)(A).

## ARGUMENT

### SECTION 213(b)(10)(A) DOES NOT EXEMPT "SERVICE ADVISORS" AT AUTOMOBILE DEALERSHIPS FROM THE FLSA'S OVERTIME-PAY REQUIREMENTS

Section 213(b)(10)(A) does not exempt from the FLSA's overtime-pay requirements "service advisors" at car dealerships. That provision, when read in context, carves out an overtime exemption for a "salesman" who is "primarily engaged in selling * * * automobiles," but not for a service advisor who sells the servicing of automobiles. The statutory text and drafting history strongly indicate that service advisors do not qualify for this exemption.

The first question under the Court's familiar *Chevron* analysis is "whether Congress has directly spoken to the precise question at issue" by making its intent on that question "unambiguous[]." *Chevron U.S.A. Inc.* v *NRDC*, 467 U.S. 837, 842-843 (1984). In the government's view, Congress did not speak so clearly as to put the point beyond dispute. That statutory ambiguity, however, was authoritatively resolved by the Department in its 2011 notice-and-comment implementing regulations, which interpret "salesman" in this context to mean an employee employed for the purpose of, and who is primarily engaged in, "making sales * * * of the automobiles" sold by the dealership. 29 C.F.R. 779.372(c)(1). As explained below, the Department's regulation is reasonable and is entitled to *Chevron* deference.

#### A. Section 213(b)(10)(A), While Not Unambiguous, Is Best Read Not To Exempt Service Advisors

Section 213(b)(10)(A)'s overtime exemption applies to "any salesman, partsman, or mechanic primarily

engaged in selling or servicing automobiles, trucks, or farm implements" if he is employed by a retail dealership primarily engaged in selling such vehicles or implements. 29 U.S.C. 213(b)(10)(A). The question presented in this case largely turns on the relationship between the first two disjunctively phrased series of words in that provision: (1) "salesman, partsman, or mechanic," and (2) "selling or servicing automobiles." Section 213(b)(10)(A)'s application to a "salesman" is best read to apply only to a "salesman" primarily engaged in "selling * * * automobiles," because the act of "servicing automobiles" logically ties only to a "partsman" or "mechanic" and not to a "salesman." Compare 29 U.S.C. 213(b)(10)(B) (linking "salesman" only with "selling" vehicles). Under that reading, service advisors, even if they qualify as a type of "salesman," fall outside the scope of Section 213(b)(10)(A) because they are primarily engaged in *selling the servicing* of automobiles, not selling the automobiles themselves.

***1. Section 213(b)(10)(A)'s text and statutory context are best read as using distributive phrasing to exempt a "salesman" only when he is primarily engaged in "selling * * * automobiles"***

*a. Distributive phrasing properly links words in a series only to their appropriate referent*

Section 213(b)(10)(A)'s contains a series of nouns ("salesman, partsman, or mechanic") and a subsequent series of gerunds ("selling or servicing"). The words in each series are linked by the term "or." That term is "almost always disjunctive, that is, the words it connects are to be given separate meanings." *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390

(2014) (citation omitted). Accordingly, the nouns "salesman," "partsman," and "mechanic" are properly read as having independent meanings, as are the gerunds "selling" and "servicing." The disjunctive nature of "or" within each series, however, provides little definitive guidance beyond understanding the relationship between the series of words it joins. In particular, it does not resolve how Section 213(b)(10)(A)'s series of nouns and its series of gerunds relate to each other.[1]

A series of disjunctively phrased nouns and a subsequent series of disjunctively phrased gerunds or verbs may sometimes properly be read so that each noun applies to each gerund or verb. For instance, the sentence "any sixth-, seventh-, or eighth-grade student may elect studying, resting, or exercising during free periods" is naturally read as meaning any sixth-grader may study, rest, or exercise and any seventh- or eighth-grader has the same three options.

No grammatical rule, however, requires that noun and gerund/verb series always be read in that manner. The interpretive canon *reddendo singula singulis* ("referring each to each") recognizes that two series of words juxtaposed within a single sentence may

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[1] The disjunctive "or" can itself convey two different types of relationships between the words it connects. "Or" can carry the meaning of an exclusive disjunction (A or B, but not both) or an inclusive one (A or B or both). See Kenneth A. Adams & Alan S. Kaye, *Revisiting the Ambiguity of "And" and "Or" in Legal Drafting*, 80 St. John's L. Rev. 1167, 1180-1181 (2006); cf. 11 U.S.C. 102(5) (clarifying that "'or' is not exclusive" in the Bankruptcy Code). Thus, the phrase "selling or servicing" could be understood in the exclusive sense to suggest that an antecedent noun (such as a "salesman") is understood to engage in either "selling" or "servicing" automobiles, but not both.

properly be understood as reflecting "[d]istributive phrasing [that] applies each expression to its appropriate referent." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 214 (2012) (*Reading Law*). Under that canon, for instance, the statutory phrase "'for money or other good consideration paid or given'" has long been understood as referring to "'money paid or other good consideration given'" because the "consequent 'paid'" in context should be read to refer to "the antecedent 'money'" and the "consequent 'given' to the antecedent 'consideration.'" Francis J. McCaffrey, *Statutory Construction* § 19, at 52 (1953); see Fortunatus Dwarris, *A General Treatise on Statutes*, Pt. 2, at 613 (2d ed. 1848) (same example; explaining that terms in such juxtaposed series are applied to "the subject-matter to which they appear by the context most properly to relate"). The sentence "letters are sent to any man or woman interested in joining a fraternity or sorority" similarly is properly read to describe letters sent only to any man interested in joining a fraternity and any woman interested in joining a sorority. Cf. *Reading Law* 214 (providing similar example).

Such applications of the distributive-phrasing canon are justified by "the simple observation" that English speakers "sometimes do combine multiple series of ideas in a distributive manner." R.N. Graham, *In Defense of Maxims*, 22 Statute L. Rev. 45, 57 (2001) (Graham); see Earl T. Crawford, *The Construction of Statutes* § 194, at 334 (1940) (*reddendo* canon "finds its justification in our use of the English language"). Although any ambiguity produced by using distributive syntax can be eliminated with sentences that directly connect each intended word pairing and sepa-

rate the paired words from the others, distributive phrasing yields a linguistic economy that continues to "appear from time to time in modern statutes." Graham 58. Cf. *Reading Law* 215-216 & n.8 (noting that "distributive-phrasing has largely fallen into disuse" in statutory drafting; citing Graham). The existence of such provisions[2] reflects that distributive phrasing is consistent with grammatical norms and that the meaning of provisions like Section 213(b)(10)(A) will not necessarily be resolved by the presence a disjunctive "or."

For instance, in *United States* v. *Simms*, 5 U.S. (1 Cranch) 252 (1803), the United States sought to recover a statutory penalty in the District of Columbia by invoking a Virginia statute authorizing "any person" to bring an action of debt for a $150 statutory penalty against the owner of an establishment at which unlawful gambling occurred. *Id.* at 252-253; see *id.* at 254. Although Congress had made that statute applicable to the portions of the District ceded by Virginia, the government "admitted that, under the laws of Virginia, an indictment for this penalty could not be sustained." *Id.* at 256. The government instead argued that Congress had established a "new

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[2] See, *e.g.*, 7 U.S.C. 1a(18)(a)(v)(III)(bb) ("an asset or liability owned or incurred"); 10 U.S.C. 2563(c)(1)(C) ("articles or services [that] can be substantially manufactured or performed" by certain facilities); 33 U.S.C. 1341(a)(4) (a "facility or activity shall be operated or conducted"); 42 U.S.C. 1396b(w)(1)(D)(ii) ("legislation or regulations * * * enacted or adopted"); 42 U.S.C. 4052(b)(2) ("profits or losses realized or sustained"); 43 U.S.C. 902 ("any patent or certification of lands erroneously patented or certified"); 47 U.S.C. 155(c)(3) ("any order, decision, report, or action made or taken" pursuant to delegated authority, where "taken" applies only to "action").

remedy" authorizing recovery of the penalty by indictment. *Ibid.* The statute forming the basis for that argument provided that "all fines, penalties and forfeitures accruing under the laws of the states of Maryland and Virginia, which by adoption have become the laws of this [D]istrict, shall be recovered with costs, by indictment or information in the name of the United States, *or* by action of debt in the name of the United States and of the informer." *Id.* at 254 (emphasis added).

Chief Justice Marshall, writing for the Court, rejected the government's argument that the disjunctively phrased statute allowed it to collect the statutory penalty by indictment. *Simms*, 5 U.S. (1 Cranch) at 258-259. The Court instead invoked "*reddenda singula singulis*," *id.* at 259, to interpret Congress's authorization distributively, such that the United States could proceed by indictment only when the law of the particular State under which the penalty accrued would itself allow the State to proceed by indictment. *Id.* at 258-259. Because Virginia law allowed a *qui tam* relator to seek the statutory penalty only in an action in debt, the Court explained, it was "more proper to suppose the *qui tam* action * * * to be the remedy." *Id.* at 259.

*b. Section 213(b)(10)'s text reflects the use of distributive phrasing*

i. The touchstone for applying the *reddendo* principle, like statutory construction more generally, is context. Two primary contextual considerations in Section 213(b)(10)'s text strongly indicate that Congress intended Section 213(b)(10)(A) to exempt any "salesman" primarily engaged in "selling * * * automobiles" and intended the phrase "servicing automo-

biles" to apply only to a "partsman" or "mechanic," not a "salesman."

First, the term "salesman," as the court of appeals recognized, "strongly implies" the activity in the statutory provision to which the term applies: "selling * * * automobiles." Pet. App. 15. In common parlance, a "salesman" is not normally understood to be "primarily engaged in * * * servicing automobiles," 29 U.S.C. 213(b)(10)(A). "Servicing" automobiles is more logically tied to the mechanics and partsmen who engage in such servicing. Correspondingly, the term "mechanic" in Section 213(b)(10)(A) likewise indicates distributive phrasing. Otherwise, the provision would apply to a "mechanic" primarily engaged in "selling * * * automobiles," 28 U.S.C. 213(b)(10)(A). But just as a "salesman" does not primarily engage in "servicing" automobiles as those terms are commonly understood, neither does a "mechanic" primarily engage in "selling" automobiles.

Second, Section 213(b)(10)(B) demonstrates that when Congress separated "salesman" from "partsman" and "mechanic," Congress linked "salesman" *only* to the "selling" of the vehicles sold by their employers.

Section 213(b)(10)(A) and (B) were both enacted in the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, 88 Stat. 65. The language for each of the provisions originated in H.R. 12435, as reported in the House of Representatives. Compare H.R. 12435, 93d Cong., 2d Sess. § 14, at 71-72 (Mar. 14, 1974) (as reported), with 29 U.S.C. 213(b)(10)(A) and (B).[3] The House Report accompanying that bill

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[3] After the House passed Section 213(b)(10)'s text in H.R. 12435, see 120 Cong. Rec. 7331, 7338 (1974), the House inserted the

explained that the bill's revision of Section 213(b)(10) was designed to "repeal[]" "[t]he overtime exemption for partsmen and mechanics" in establishments "selling aircraft and trailers" while retaining the pre-existing exemption for the "salesmen" in those establishments. H.R. Rep. No. 913, 93d Cong., 2d Sess. 47 (1974). The report further explained that the bill added a new exemption for "salesmen in non-manufacturing establishments primarily engaged in selling boats." *Ibid.* The House Report's description of the bill accordingly treated all of the "salesmen" that H.R. 12435 would exempt in the same manner, stating that the "salesmen in nonmanufacturing establishments primarily engaged in selling aircraft, automobiles, trucks, trailers, farm implements, and boats" would be exempt. *Ibid.* The bill's sponsor, Representative Dent, explained the conference agreement in the same way. 120 Cong. Rec. 8602 (1974).[4]

For the trailer-, boat-, and aircraft-selling establishments whose "salesman" (but not partsman or mechanic) is exempt, Congress enacted text exempting "any *salesman* primarily engaged in *selling* trailers, boats, or aircraft." 29 U.S.C. 213(b)(10)(B) (emphases added). That provision thus effectuated the repeal of the earlier exemption for partsmen and mechanics in trailer- and aircraft-selling establish-

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provisions of that bill into S. 2747, passed the latter, and requested a conference on S. 2747, *id.* at 7344, 7349. Congress adopted the House text in Section 213(b)(10). See H.R. Conf. Rep. No. 953, 93d Cong., 2d Sess. 11 (1974).

[4] Representative Perkins similarly had earlier explained that, under H.R. 12435's direct predecessor, boat "salesmen are treated like automobile, truck and agricultural implement salesmen." 119 Cong. Rec. 18,158 (1973); cf. H.R. Rep. No. 913, at 4 (discussing evolution of H.R. 12435 from H.R. 7935).

ments—not only by omitting the terms "partsman" and "mechanic," but also by omitting the *activity*—the "servicing" of trailers and aircraft—linked to those employees.

In doing so, Congress indicated its intent that an exempt "salesman" primarily engages in "selling" vehicles, and that "servicing" such vehicles is performed only by partsmen and mechanics. Congress's contemporaneous decision to retain the gerund "servicing" in Section 213(b)(10)(A) thus reflects that Section 213(b)(10)(A) uses distributive phrasing to connect the word "salesman" only to "selling" vehicles and the words "partsman" and "mechanic" to "servicing" vehicles. That use of "salesman" directly tracks the Department's 1970 Interpretive Bulletin's interpretation of "salesman," 29 C.F.R. 779.372(c)(1) (1971), with which Congress was presumably familiar when it enacted Section 213(b)(10)(A) and (B) in 1974.

ii. Petitioner argues (Br. 29-30) that Section 213(b)(10)(A) must be read to cover a service advisor, on the rationale that such an employee who sells the servicing of automobiles is a "salesman" who is "primarily engaged in * * * servicing automobiles," 29 U.S.C. 213(b)(10)(A). Any other reading, petitioner asserts (Br. 30), would render the provision's application to a "partsman" a nullity. That is incorrect.

The phrase "to engage in servicing automobiles," when used in ordinary language, means "to employ or involve oneself" and "to take part" in "repair[ing] or provid[ing] maintenance for" automobiles. See *Webster's Third New International Dictionary* 751 (1966) (defining the verb "engage"); *id.* at 2075 (defining the verb "service"). Unlike a service advisor, a partsman is naturally understood to involve himself in repairing

or providing maintenance for automobiles by working with a mechanic and "dispensing parts," 29 C.F.R. 779.372(c)(2).[5] An English speaker would regard an individual who hands parts to a mechanic while the mechanic installs them on a car to be himself involved in repairing or providing maintenance for the car, even if he does not personally install the parts. See Resp. Br. 32-35 (describing cooperation between partsmen and mechanics). A mechanic, of course, might be able to obtain the parts to complete a repair without the real-time assistance of a partsman by his side. But that merely reinforces the conclusion that a partsman is involved in repairing or providing maintenance because he performs key tasks in repairing the vehicle. Dividing those tasks between two individuals reflects that both the mechanic and the partsman are logically understood as involved in repairing ("servicing") the vehicle.

A service advisor, by contrast, plays no similar role. Petitioner repeatedly argues that a service advisor is engaged in the service "process" because he is "engaged in the *selling of the servicing* of automobiles." Pet. Br. 19, 23, 25 (emphasis added). But an individual who simply suggests to the customer the servicing to be performed, and in that sense is "selling" the servicing, is not naturally understood to be "primarily engaged in * * * servicing automobiles," because he does not primarily "involve [him]self" and

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[5] The Department interprets a "partsman" to be an employee who "dispens[es] parts" and the associated duties of "requisitioning" and "stocking" parts. 29 C.F.R. 779.372(c)(2). The Department similarly interprets a "salesman" as one who not only sells vehicles but performs work "incidental to and in conjunction with the employee's own sales or solicitations." 29 C.F.R. 779.372(c)(1).

"take part" in "repair[ing] or provid[ing] maintenance for" such automobiles. See *Webster's Third New International Dictionary* 751, 2075. Just as a person who sells plastic surgery, technical support, or house painting is not by virtue of his salesmanship actually *engaged in* plastic surgery, technical support, or painting, a service advisor who *sells* servicing is not engaged in that servicing. The servicing is performed later, by others.

Petitioner asserts (Br. 25) that it would be "nonsensical to suggest that an individual who is primarily engaged in selling the servicing of automobiles is engaged in neither selling nor servicing automobiles." But petitioner loses sight of the FLSA's text. It is entirely sensical to conclude that an individual "*selling* the *servicing* of automobiles," *ibid.* (emphasis added), is neither "selling * * * automobiles" nor "servicing automobiles," as Section 213(b)(10)(A) requires. Petitioner does not argue that service advisors are primarily engaged in selling automobiles. And, as explained, the job of "selling the servicing" is not the same as actually servicing automobiles. Petitioner's reading makes a hash of the statutory phrase "selling *or* servicing automobiles" by reading Section 213(b)(10) to cover the "selling *of* servicing automobiles."

***2. Section 213(b)(10)'s legislative history indicates that Congress understood the exemption to apply only to those salesmen who sell vehicles***

Section 213(b)(10)'s legislative history similarly reflects that Congress intended the provision to be read distributively to exempt only a "salesman * * * selling * * * automobiles."

Beginning with NADA's initial 1965 request for the overtime exemption, the legislative history reflects the understanding that Section 213(b)(10)'s exemption for salesmen would apply simply to salesmen of vehicles or farm implements. NADA justified the exemption by explaining that the "automobile salesmen" who would be exempt are "extremely well-paid employees" who did not need overtime protection. *1965 House Hearing* 368. Moreover, NADA's representative testified, it would be "practically impossible" to "keep accurate records of the time [a salesman] spends working" because "[a] salesman * * * is actually selling, or trying to sell, every place he goes where he is in contact with the public" and therefore "spends a substantial number of hours performing his duties away from the dealer's place of business." *Id.* at 368-369; see *id.* at 372. That description applies to automobile salesmen but not to service advisors, who are posted in, and do their selling from, the dealer's premises.

The floor debates on Section 213(b)(10) suggest no intent to exempt employees like service advisors. Reflecting NADA's rationale for exempting salesmen of automobiles, Senator Yarborough explained that "salesmen * * * do not get overtime because their work is outside" and "[t]he reason for exempting the salesmen" from the overtime requirement "was the difficulty of their keeping regular hours." 112 Cong. Rec. 20,504 (1966). "The salesman tries to get [customers] mainly after their hours of work" when customers are able to "look at automobiles." *Ibid.* For that reason, the bill's exemption was designed to allow a "salesman * * * [to] go out and sell an Oldsmobile, a Pontiac, or a Buick all day long and all night." *Ibid.*;

see *ibid.* (statement of Sen. Bayh) ("Salesmen are a little different breed of cats, because they go out at unusual hours, trying to earn commissions.").

Similarly, when Congress considered legislation that led to the 1974 Fair Labor Standards Amendments, NADA urged retaining Section 213(b)(10)'s exemption with statistics illustrating the adequacy of the salaries of "car and truck salesmen," "partsmen," and "automobile mechanics." *Fair Labor Standards Amendments of 1971: Hearings on S. 1861 and S. 2259 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. Pt. 2, at 780, 783 (1971). NADA again explained "salesmen" spend "substantial" time working away from the dealership. *Id.* at 780. And NADA's representative specifically discussed mechanics' work with "service advisors[s]" or "service manager[s]" but never suggested that the latter were exempt under Section 213(b)(10). See *id.* at 780-781.

***3. There is no occasion in this case to rely on the principle that FLSA exemptions are narrowly construed***

Petitioner contends (Br. 34-35) that the Ninth Circuit erred by "effectively appl[ying] a clear statement rule" requiring a "narrow construction" of FLSA exemptions and that this Court should reject such a rule by requiring exemptions to be read "fairly and correctly." This Court's decisions, however, have long established that a narrow construction of ambiguous FLSA exemptions is the correct method to construe the Act. In any event, this case presents no occasion to address that principle. The court of appeals did not rest its judgment on the principle, and the question presented is properly resolved without relying on it.

It has long been "well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed." *Mitchell* v. *Kentucky Fin. Co.*, 359 U.S. 290, 295 (1959); see *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). "Breadth of coverage was vital to [the Act's] mission," which Congress has declared in "bold and sweeping terms" with only "narrow and specific" exemptions. *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 516-517 (1950).

That FLSA principle is a particularly well grounded variant of the interpretive rule that "[a]n exception to a 'general statement of policy' is 'usually read narrowly in order to preserve the primary operation of the provision.'" *Maracich* v. *Spears*, 133 S. Ct. 2191, 2200 (2013) (quoting *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989)); see *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 731-732 (1995). Unless "commanded by the text," such "exceptions ought not operate to the farthest reach of their linguistic possibilities," *Maracich*, 133 S. Ct. at 2200, lest they "eviscerate th[e] legislative judgment" underlying the "general rule" that they would displace. *Clark*, 489 U.S. at 739. And because that principle applies when construing exceptions from a general rule, it does not extend to contexts involving "general definition[s] that appl[y] throughout the FLSA." *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n.21 (2012); see *Sandifer* v. *United States Steel Corp.*, 134 S. Ct. 870, 879 (2014).

In this case, the narrow-construction principle does not affect the proper disposition. Where, as here, an agency has exercised its "legislative[ly] delegat[ed]" authority to resolve ambiguity in "the statute by regulation," "a court may not substitute its own construc-

tion" for that of the agency if the agency has adopted a "reasonable interpretation," even if "the court would have reached" a different reading on its own. *Chevron*, 467 U.S. at 843 n.11, 844; see *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005); cf. *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001).

The court of appeals appears to have followed that course in this case. Although it noted the "background rule" that FLSA exemptions are narrowly construed, Pet. App. 6, the court concluded that the scope of Section 213(b)(10)'s exemption is itself ambiguous, *id.* at 7-8, before adding that application of the narrow-construction canon could not "aid [petitioner]" in this case, *id.* at 8. The court therefore proceeded under *Chevron*'s analytical framework to determine that the Department's notice-and-comment regulation reasonably interpreted the statute's ambiguous text and was entitled to deference. *Id.* at 11; see *id.* at 11-19. In doing so, the court briefly noted that the Department's interpretation "accords with the presumption that the § 213 exemptions should be construed narrowly," while emphasizing that the agency's interpretation need not be the "best construction" to warrant *Chevron* deference. *Id.* at 11 (citation omitted).

This case thus does not present an occasion to address whether the FLSA's exemptions should be narrowly construed when an agency interpretation reaches a different result or in the absence of any administrative interpretation. The agency's interpretation here not only is a reasonable reading of Section 213(b)(10)(A), it is the better one. That holds true

regardless whether Section 213(b)(10)(A) should be narrowly construed.

### B. The Department's Notice-And-Comment Regulations, Which Reasonably Implement Section 213(b)(10)(A), Are Entitled To *Chevron* Deference

For the reasons stated above, the text, statutory context, and legislative history strongly suggest that Congress utilized distributive phrasing in Section 213(b)(10)(A) to exempt from the Act's overtime requirements those salesmen who are primarily engaged in "selling * * * automobiles," but not service advisors. In the government's view, however, those factors do not sufficiently show that "Congress has directly spoken to the precise question at issue" by expressing an unambiguous intent to exclude service advisors under Section 213(b)(10)(A), see *Chevron*, 467 U.S. at 842-843.

They do, however, demonstrate that the Department reasonably concluded in its 2011 rulemaking that a "salesman" must be primarily engaged in selling vehicles, 29 C.F.R. 779.372(c)(1); that the exemption "requires an employee to either primarily service the vehicle or 'sell' the vehicle—not sell the service of the vehicle"; and that "service advisors" accordingly are not exempt under Section 213(b)(10)(A), see 76 Fed. Reg. 18,838 (Apr. 5, 2011). Petitioner, however, argues that the Department's notice-and-comment regulation is a mere "interpretive" rule given a lesser degree of deference, Br. 40-41, and that deference is unwarranted because the regulation does not sufficiently justify upsetting settled expectations and would produce significant adverse consequences, Br. 40-45. Those contentions are without merit.

*1. The Department's regulations are reviewed for reasonableness under* Chevron

Petitioner states (Br. 36-37) that the Department's 2011 regulations implementing Section 213(b)(10) are entitled to "less deference" than a legislative rule and, as such, may be upheld only if "reasonable." To the extent petitioner seeks to distinguish between arbitrary-and-capricious review, which applies when Congress "explicitly le[aves] a gap for the agency to fill," and the traditional type of *Chevron* deference owed to an agency's "reasonable" statutory interpretation, which applies when Congress "implicit[ly]" vests an agency with authority to resolve ambiguity in a statute it administers, see *Chevron*, 467 U.S. at 843-844, the government agrees that "reasonableness" deference is warranted. Such "implicit" delegations are often reflected in an "agency's generally conferred authority," indicating Congress's intent that the agency will "speak with the force of law when it addresses ambiguity in the statute." *Mead Corp.*, 533 U.S. at 229; see *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1874 (2013) ("[N]o" case has ever held that "a general conferral of rulemaking or adjudicative authority" is "insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field.").

Congress delegated such authority to the Department by expressly authorizing it to issue rules and regulations concerning this exemption. The exemption was adopted in the Fair Labor Standards Amendments of 1966 and revised in similar amendments in 1974, and both statutes confer authority to prescribe "necessary rules, regulations, and orders with regard to the amendments" made therein. Pub. L. No. 93-

259, § 29(b), 88 Stat. 76; see Pub. L. No. 89-601, § 602, 80 Stat. 844. The Department's 2011 invocation of notice-and-comment rulemaking to exercise that authority reflects a prototypical example of agency action entitled to *Chevron* deference. See *Mead Corp.*, 533 U.S. at 229. Indeed, this Court has already held that the 1974 Act's rulemaking provision authorizes the Department to "fill gaps [in a Section 213(b) exemption] through rules and regulations" that are then entitled to *Chevron* deference. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 165 (2007).

***2. The Department sufficiently justified its 2011 regulations, which do not impose retroactive liability***

Petitioner argues (Br. 40-42) that the Department's 2011 regulations are not entitled to deference because the Department did not sufficiently "explain[] the changes in policy [or] account[] for reliance interests" arising from the agency's 1978 opinion letter and 1987 Field Operations Handbook. The agency, however, fully satisfied its obligation to engage in reasoned decisionmaking by showing an "awareness" of its prior interpretations and "good reasons" for its 2011 regulations, *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (*Fox*). See 76 Fed. Reg. at 18,838 (discussing 1978 opinion letter and basis for current regulatory interpretation); 73 Fed. Reg. 43,654, 43,659 (July 28, 2008) (discussing 1987 Handbook).

Petitioner incorrectly suggests that the Department's interpretation of Section 213(b)(10) altered a prior policy engendering "serious reliance interests" that the agency needed to address. Br. 41 (quoting *Fox*, 556 U.S. at 515, and citing *Smiley* v. *Citibank, N.A.*, 517 U.S. 735, 742 (1996)). The type of reliance interests suggested by *Fox* and *Smiley* involve the

imposition of retroactive civil liability for "past actions * * * taken in good-faith reliance on [agency] pronouncements," *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (dictum), or criminal liability for past actions taken in good-faith reliance on an agency interpretation erroneously treating unlawful conduct as lawful, *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 670-675 (1973) (holding a good-faith defense may be asserted). Such interests are not implicated by 29 C.F.R. 779.372(c), which has no untoward retroactive effects.

Although petitioner suggests that the 2011 regulations create "retroactive liability," Br. 43, petitioner is mistaken. Congress specifically contemplated that, in the course of its administration of the FLSA, the Department would from time to time modify or rescind its administrative measures such as regulations, rulings, and interpretations. See 29 U.S.C. 259(a). The Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, accordingly provides that an employer sued for alleged FLSA violations "shall [not] be subject to any liability" for failing "to pay minimum wages or overtime compensation" under the FLSA if the employer establishes that its "act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of [the Administrator of the Department's Wage and Hour Division]," even if that agency guidance has since been "modified or rescinded." 29 U.S.C. 259(a) and (b)(1); see 29 C.F.R. 790.13. The 2011 regulations thus should not produce "retroactive liability," because an appropriate defense should be recognized for service advisors' overtime claims accruing before the regulations' May 5, 2011

effective date. Cf. 76 Fed. Reg. at 18,832 (effective date).

The Department acknowledged NADA's contention that the "automobile and truck dealership industry ha[d] relied upon the Administrator's 1978 opinion letter" concerning service advisors. 76 Fed. Reg. at 18,838. But the final rule became effective one month after its publication in the Federal Register, *id.* at 18,832, thereby allowing a reasonable transition away from any unlawful employment practices and the prospective documentation of wages and hours by employers of service advisors. Nothing more was necessary.[6]

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[6] NADA's actions confirm that automotive dealers have had ample notice of the Department's 2011 regulations. Once the Department published the regulations, NADA successfully persuaded Congress to enact an appropriations rider temporarily prohibiting the Department from enforcing the FLSA's overtime-pay requirements with respect to service advisors by prohibiting appropriated funds from being used to "administer or enforce 29 C.F.R. 779.372(c)(4)." Department of Labor Appropriations Act, 2012, Pub. L. No. 112-74, Div. F, Tit. I, § 113, 125 Stat. 1064 (enacted Dec. 23, 2011); see NADA Press Release, *House Appropriations Subcommittee Preserves Service Advisors Overtime Exemption* (July 18, 2012), http://www.nadafrontpage.com/Service_Advisors_Overtime_Exemption.xml. That rider continued in force under continuing resolutions, but ceased to have effect with the January 2014 enactment of the Department of Labor Appropriations Act, 2014, Pub. L. No. 113-76, Div. H, Tit. I, 128 Stat. 347. See J. Res. of Jan. 14, 2014, Pub. L. No. 113-73, 128 Stat. 3; Continuing Appropriations Act, 2014, Pub. L. No. 113-46, Div. A, § 101(a)(6), 127 Stat. 558; Full-Year Continuing Appropriations Act, 2013, Pub. L. No. 113-6, Div. F, Tit. I, § 1101(a)(4), 127 Stat. 412; Continuing Appropriations Resolution, 2013, Pub. L. No. 112-175, § 101(a)(8), 126 Stat. 1313. Despite having adopted a temporary rider to halt governmental enforcement actions, Congress

### *3. Petitioner's claims of far-reaching consequences are misplaced*

Petitioner's assertion (Br. 42-45) of "far-reaching consequences" stemming from a purported "retroactive reclassifi[cation]" requiring overtime pay creating "potentially significant retroactive liability" is misplaced in light of the prospective application of the Department's regulations discussed above. See pp. 32-33, *supra*. Moreover, petitioner ignores the fact that service advisors may be exempt under a different FLSA exemption applicable to retail salesmen paid on commission. See 29 U.S.C. 207(i). Petitioner repeatedly emphasizes that respondents, like many service advisors at automobile dealerships, are paid on a commission basis, suggesting that overtime pay is unwarranted in light of such incentive-based pay. See, *e.g.*, Pet. Br. 1, 7, 13 & n.4, 38-39, 42-44. Although Section 213(b)(10)'s overtime exemption depends on the nature of an employee's work as a "salesman," "partsman," or "mechanic," without regard to the method of compensating the employee, Section 207(i) separately accounts for petitioner's commission-focused concerns.

Congress in Section 207(i) defined the category of commission-earning salespersons that it determined should be exempt from overtime pay. That provision exempts any employee of "a retail or service establishment" who is paid "more than half his compensation" in "commissions on goods or services" if the employee's "regular rate [of pay] is more than one and one-half times the minimum [federal] hourly rate." 29

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neither overturned the Department's 2011 regulations nor amended Section 213(b)(10) to apply to service advisors.

U.S.C. 207(i). At the current $7.25/hour federal minimum wage, which became effective in 2009, see 29 U.S.C. 206(a)(1)(C), such employees must earn at least $10.88/hour, which corresponds to $22,696/year for a standard 2087-hour work year. Cf. 5 U.S.C. 5504(b) (work year).

Nothing suggests that dealerships like petitioner, which are "primarily engaged in the business of selling [automobiles] to ultimate purchasers," 29 U.S.C. 213(b)(10)(A), would be unable to qualify as a "retail or service" establishment under Section 207(i). To the contrary, Congress enacted Section 207(i) with automobile dealerships in mind.[7] And if service advisors paid "primarily on sales commissions rather than hourly wages" are as "well compensated" as petitioner suggests (Br. 7, 40, 42), such employees should fall within the Section 207(i) overtime-pay exemption. If not, petitioner provides no reason why such lower-paid employees should be denied the overtime available to similarly situated sales personnel in other businesses.

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[7] See, *e.g.*, 106 Cong. Rec. 15,195 (1960) (statement of Rep. Dent) (explaining that Section 207(i) reflects an agreement accepted by "automobile dealers" that would exempt salesmen earning "1½ times the legal minimum wage" when "50 percent or more of that income comes from commissions"); *id.* at 15,220 (statement of Rep. Roosevelt) (explaining that "the automobile dealers' problem has been solved" by Representative Dent's amendment).

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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## APPENDIX

1. 29 U.S.C. 207 provides in pertinent part:

**Maximum hours**

* * * * *

**(i) Employment by retail or service establishment**

No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

* * * * *

2. 29 U.S.C. 213 (1970) provided in pertinent part:

**Exemptions**

* * * * *

(b) The provisions of section 207 of this title shall not apply with respect to—

* * * * *

(10) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers; or

* * * * *

3. 29 U.S.C. 213 provides in pertinent part:

**Exemptions**

* * * * *

**(b) Maximum hour requirements**

The provisions of section 207 of this title shall not apply with respect to—

* * * * *

(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

* * * * *

4. 29 U.S.C. 259 provides in pertinent part:

**Reliance in future on administrative rulings, etc.**

(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) of this section shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.]—the Administrator of the Wage and Hour Division of the Department of Labor;

* * * * *

5. 29 C.F.R. ¶779.372 (1971) provided in pertinent part:

**Nonmanufacturing establishments with certain exempt employees under section 13(b)(10).**

* * * * *

(c) *"Salesman, partsman, or mechanic."* (1) As used in section 13(b)(10), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicles or farm implements which the establishment is primarily engaged in selling. Work performed incidental to and in conjunction with the employee's own sales or solicitations, including incidental deliveries and collections, is regarded as within the exemption.

(2) As used in section 13(b)(10), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.

(3) As used in section 13(b)(10), a mechanic is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive, truck, farm implement, or aircraft mechanics, body or fender mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile,

trailer, truck, farm implement, or aircraft for its use and operation as such. This includes mechanical work required for safe operation as a vehicle, farm implement, or aircraft. The term does not include employees primarily performing such nonmechanical work as washing, cleaning, painting, polishing, tire changing, installing seat covers, dispatching, lubricating, or other nonmechanical work. Wrecker mechanic means a service department mechanic who goes out on a tow or wrecking truck to perform mechanical servicing or repairing of a customer's vehicle away from the shop, or to bring the vehicle back to the shop for repair service. A tow or wrecker truck driver or helper who performs no mechanical repair work is not exempt. When employed by an establishment qualifying under section 13(b)(10) which sells and services trailers, mechanics primarily engaged in servicing the trailers for their use and operation as such may qualify for the exemption. "Trailers" include a wide variety of nonpowered vehicles used for industrial, commercial, or personal transport or travel on the highways by attaching the vehicle to the rear of a separate powered vehicle. It is not yet clear under what circumstances and to what extent so-called "mobile homes" designed for residential uses other than in connection with the owner's travel can qualify as "trailers" within the meaning of the statute. (Compare Snell v. Quality Mobile Home Brokers (D.S.C.), 18 WH Cases 875, with Wirtz v. Louisiana Trailer Sales, 294 F Supp. 76 (E.D. La.).) However, if and to the extent that they are operated and used as trailers, mechanics servicing them for such operation and use would appear to be performing work within the purview of the exemption provided for mechanics in section 13(b)(10), to the

same extent as mechanics servicing automobiles, ordinary travel, boat, or camping trailers, trucks, and truck or tractor trailers for use and operation as such. On the other hand, there is no indication in the statutory language or the legislative history of any intent to provide exemption for mechanics whose work is directed to the habitability as a residence of a dwelling to be used as such on a fixed site in a particular locality, merely because the home is so designed that it may be moved to another location over the highways more readily than the traditional types of residential structures. Accordingly, servicemen checking, servicing, or repairing the plumbing, electrical, heating, air conditioning or butane gas systems, the doors, windows, and other structural features of mobile homes to make them habitable or more habitable as residences are, while so engaged, not deemed to qualify as "mechanic(s) * * * servicing * * * trailers" within the meaning of section 13(b)(10).

(4) Employees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsman, or mechanic as described above are not exempt under section 13(b)(10). This is true despite the fact that such an employee's principal function may be disagnosing [*sic*] the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics.

(d) *Primarily engaged.* As used in section 13(b)(10), primarily engaged means the major part or over 50 percent of the salesman's partsman's, or me-

chanic's time must be spent in selling or servicing the enumerated vehicles. As applied to the establishment, primarily engaged means that over half of the establishment's annual dollar volume of sales made or business done must come from sales of the enumerated vehicles.

6. 29 C.F.R. 779.372 provides in pertinent part:

**Nonmanufacturing establishments with certain exempt employees under section 13(b)(10).**

* * * * *

(c) *Salesman, partsman, or mechanic.* (1) As used in section 13(b)(10)(A), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the automobiles, trucks, or farm implements that the establishment is primarily engaged in selling. As used in section 13(b)(10)(B), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of trailers, boats, or aircraft that the establishment is primarily engaged in selling. Work performed incidental to and in conjunction with the employee's own sales or solicitations, including incidental deliveries and collections, is regarded as within the exemption.

(2) As used in section 13(b)(10)(A), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.

(3) As used in section 13(b)(10)(A), a mechanic is any employee primarily engaged in doing mechanical

work (such as get ready mechanics, automotive, truck, or farm implement mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile, truck or farm implement for its use and operation as such. This includes mechanical work required for safe operation, as an automobile, truck, or farm implement. The term does not include employees primarily performing such nonmechanical work as washing, cleaning, painting, polishing, tire changing, installing seat covers, dispatching, lubricating, or other nonmechanical work. Wrecker mechanic means a service department mechanic who goes out on a tow or wrecking truck to perform mechanical servicing or repairing of a customer's vehicle away from the shop, or to bring the vehicle back to the shop for repair service. A tow or wrecker truck driver or helper who primarily performs nonmechanical repair work is not exempt.

(d) *Primarily engaged.* As used in section 13(b)(10), primarily engaged means the major part or over 50 percent of the salesman's, partsman's, or mechanic's time must be spent in selling or servicing the enumerated vehicles. As applied to the establishment, primarily engaged means that over half of the establishments annual dollar volume of sales made or business done must come from sales of the enumerated vehicles.